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2 1.4 **Citations Discussed.** WAC 358-30-170; WAC 251-12-240(1); Baker v. Dep't of  
3 Corrections, PAB No. D82-084 (1983); Johnson v. Lower Columbia College, PAB No. D93-077  
4 (1994); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Schonauer v.  
5 DCR Entertainment, 79 Wn. App. 808 (1995), *review denied*, 129 Wn. 2d 1014 (1996); Maruca v.  
6 Dep't of Labor and Industries, PAB No. D94-009 (1995), *appeal filed* Thurston Co. Super. Ct. No.  
7 95-2-03873-2

## 8 9 **II. FINDINGS OF FACT**

10 2.1 Appellant Pedro Paltep was a Custodian Lead and permanent employee for Respondent  
11 University of Washington in the Custodial Services Division of Facilities Services. Appellant and  
12 Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder,  
13 Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on  
14 July 12, 2000.

15  
16 2.2 By letter dated June 28, 2000, Jeraldine McCray, Assistant Vice President for Facilities  
17 Services, informed Appellant of his dismissal effective at the end of his work day on July 14, 2000.  
18 Ms. McCray charged Appellant with neglect of duty, abuse of an employee, violation of University  
19 of Washington policy, state and federal laws against sexual harassment. Ms. McCray alleged that  
20 Appellant sexually harassed a subordinate.

21  
22 2.3 On November 22, 1985, Appellant began his employment with the University of  
23 Washington as a Custodian in the Custodial Services Division of Facilities Services. In December  
24 1994, Appellant was promoted to a Lead Custodian position. Appellant was assigned to work in the  
25 Health Sciences Building on D Wing, B Wing, NW-1 and the basement of AA Wing. Appellant  
26 worked from 4:30 p.m. to 1 a.m. Appellant's duties included performing routine paperwork,

1 removing trash collected by other custodians, inspecting work areas, reporting safety problems and  
2 repair needs and assisting custodians as necessary. Appellant had lead responsibilities over several  
3 custodians, including Amalia Whitney, Roger Purganan, and Mulu Sium.

4  
5 2.4 The specific allegations which led to Appellant's dismissal were outlined in a memorandum  
6 dated May 23, 2000 to Gene Woodard, Director of Facilities Services Custodian Division from  
7 Scott Spencer, Custodian Manager. In summary, the memorandum claimed that Appellant  
8 exhibited a pattern of inappropriate behavior toward subordinate Mulu Sium by hugging her,  
9 touching her breasts and buttocks and requesting that she kiss him and touch his penis. The  
10 allegations were reported to management on March 21 2000, by Custodian Amalia Whitney.

11  
12 2.5 Appellant denies that he touched Ms. Sium or that he engaged in any inappropriate behavior  
13 toward her. However, we do not find Appellant's testimony credible. In determining the facts of  
14 this case, where there are no eyewitnesses to the alleged harassment, we have weighed the direct  
15 testimony of Appellant and Ms. Sium. We have also weighed the testimony of Ms. Whitney and  
16 Mr. Purganan who both testified as to Ms. Sium's demeanor after she disclosed Appellant's alleged  
17 actions toward her on March 2, 2000. Prior to March 2, 2000, Ms. Sium, Ms. Whitney, and Mr.  
18 Purganan, recognized each other from working in the same wing, however, they were each assigned  
19 to clean different floors. They routinely greeted each other while clocking in or out, and on a few  
20 occasions, Mr. Purganan assisted Ms. Sium with buffing the floors. However, there is no evidence  
21 that they shared a close friendship, and we find they had no motive to fabricate their stories.

22  
23 2.6 We further find no compelling reason why Ms. Sium would fabricate the events she  
24 describes. She credibly testified she had feared loss of her employment if she disclosed Appellant's  
25 inappropriate touching. Ms. Sium had nothing to gain by coming forward with her story, her  
26 retelling of the events has been consistent, and we find no reason to disbelieve her. In addition, we

1 find that Appellant and Ms. Sium worked together unobserved and there was ample opportunity for  
2 Appellant to engage in the type of behavior she described. Appellant was in a position of authority  
3 over Ms. Sium. Therefore, based on a preponderance of the credible testimony, we find that more  
4 likely than not, the following events occurred.

5  
6 2.7 Ms. Sium, who came to the United States from Africa in 1994, was hired by the University  
7 on October 25, 1999 after being interviewed on approximately six occasions. Ms. Sium was  
8 required to serve a six-month probationary period. Approximately two weeks after her initial hire,  
9 Ms. Sium was reassigned to work in the D Wing with Appellant as her lead. Ms. Sium's direct  
10 supervisor, Kelvin Agard, gave her a tour of her work area and introduced her to Appellant.

11  
12 2.8 On November 3, 1999, Ms. Sium clocked in and reported to work on the 2nd floor of the D  
13 Wing. Appellant approached Ms. Sium, greeted her and gave her a hug. Appellant then took her  
14 around the floor and introduced her to the clients whose area Ms. Sium would be cleaning. Later  
15 that same evening, Appellant reminded Ms. Sium that she was under probation and to watch out for  
16 any complaints, because she could be easily fired. Ms. Sium responded "okay" and told Appellant  
17 that she had worked very hard to get the job. Appellant then gave her another hug and left.

18  
19 2.9 During the following week, Appellant continued to greet Ms. Sium with a hug. Ms. Sium  
20 did not welcome Appellant's hugs and they made her feel very uncomfortable. At the end of her  
21 first week working for Appellant, Ms. Sium became angry, and she told him to stop hugging her.  
22 Appellant stopped hugging Ms. Sium, however, his behavior subsequently escalated and he began  
23 to make frequent visits to her work area. Some days, Appellant checked on Ms. Sium's work area  
24 up to 10 times a day. At times, Appellant would walk around Ms. Sium's work area while taking  
25 notes. At other times, Appellant would unlock the door to Ms. Sium's custodian closet while she  
26 was there on break and tell her he was "checking up" on her. The nature of Appellant's frequent

1 visits did not appear to be work related, and whenever no one else was around, Appellant would  
2 touch Ms. Sium's breasts or buttocks. Although Ms. Sium did not verbally ask Appellant to stop  
3 touching her, she routinely pushed Appellant away from her. However, Appellant did not stop his  
4 behavior, and he continued to pursue her.

5  
6 2.10 Ms. Sium attended a prevention of sexual harassment class on December 2, 1999. She  
7 understood that under the University's policy against sexual harassment she did not have to tolerate  
8 Appellant's unwanted touching and that she could report him to her supervisor. However, Ms.  
9 Sium credibly testified that she was scared of Appellant and felt powerless to report him because he  
10 was in a position of authority over her and she feared she would lose her job if he accused her of  
11 lying. Therefore, due to her fear and feelings of shame and embarrassment, Ms. Sium did not report  
12 Appellant's behavior to anyone at work.

13  
14 2.11 On December 29, 1999, Ms. Sium asked Appellant for assistance in buffing the floors.  
15 Appellant told her that she could do it herself if she did not want to be touched.

16  
17 2.12 In mid-February 2000, Appellant was on vacation. He returned to work on March 2.  
18 Sometime prior to 7 p.m., Ms. Sium was in the women's restroom cleaning inside a stall. Appellant  
19 walked up behind her, grabbed at her breasts and buttocks, told her to kiss him and to "touch my  
20 thing." Ms. Sium shoved Appellant aside and warned him that she was going to "tell Kelvin."  
21 Kelvin Agard was their direct supervisor. Ms. Sium ran out of the bathroom.

22  
23 2.13 Ms. Sium credibly testified that during the period Appellant was gone, she felt a sense of  
24 peace and that when he startled her and grabbed at her in the bathroom, she finally felt compelled to  
25 tell someone. However, Ms. Sium was still uncomfortable and embarrassed, and rather than report  
26 the incident to a man, she decided to talk to another woman. At approximately 7 p.m., Ms. Sium

1 approached Ms. Whitney. Ms. Whitney observed that Ms. Sium appeared upset and shaken. Ms.  
2 Sium told Ms. Whitney what had just occurred to her the women's restroom, however, she was too  
3 upset and embarrassed to disclose Appellant's request that she touch his penis. Ms. Sium expressed  
4 her fear with Appellant's actions and told Ms. Whitney that she was afraid to report him because  
5 she was still under probation. Ms. Whitney encouraged Ms. Sium to report the incident to Mr.  
6 Agard, however, Ms. Sium again expressed her concern that Appellant could get her terminated  
7 because she was a probationary employee. Ms. Whitney walked with Ms. Sium back to Ms. Sium's  
8 custodial closet.

9  
10 2.14 Later that evening, Ms. Whitney approached Custodian Roger Purganan and revealed what  
11 Ms. Sium had told her. During their break time, Ms. Whitney and Mr. Purganan visited Ms. Sium,  
12 who still appeared shaken and distraught. Ms. Sium again repeated what she had told Ms. Whitney.  
13 Both Ms. Whitney and Mr. Purganan encouraged Ms. Sium to report Appellant's behavior, but she  
14 continued to express concerns about being terminated from her probationary appointment. Ms.  
15 Sium stated that she would report Appellant's behavior after she became a permanent employee.

16  
17 2.15 The following day, Appellant apologized to Ms. Sium, and he did not subject her to any  
18 further inappropriate touching.

19  
20 2.16 Following the March 2 incident, Ms. Sium shared further details of Appellant's behavior  
21 with Ms. Whitney, and she finally revealed that Appellant had asked her to touch his penis. Both  
22 Ms. Whitney and Mr. Purganan respected Ms. Sium's desire to become a permanent employee prior  
23 to reporting Appellant's behavior and neither reported the incident to Mr. Agard. However, Ms.  
24 Whitney was scheduled to be out from work due to surgery in late March. Ms. Whitney became  
25 concerned that Ms. Sium would be the only woman working in the D wing and would not have  
26

1 another woman to turn to if Appellant resumed his behavior. Ms. Whitney subsequently decided it  
2 was in Ms. Sium's best interest to report Appellant's actions to their supervisor.

3  
4 2.17 On March 21, 2000, Ms. Whitney approached Mr. Agard and reported to him the March 2  
5 incident. Mr. Agard was responsible for providing Ms. Sium with training. During the times he  
6 met with Ms. Sium, he noted no change in her outward demeanor. Mr. Agard subsequently  
7 approached Ms. Sium and asked her if Appellant had been harassing her. Ms. Sium was surprised  
8 that Mr. Agard knew, and she initially responded "no" because she was still afraid to report  
9 Appellant. At Mr. Agard's urging, Ms. Sium finally disclosed the events of March 2, however,  
10 because she was embarrassed, she did not disclose that Appellant asked her to touch his penis. Ms.  
11 Sium told Mr. Agard that she did not want to get Appellant into trouble.

12  
13 2.18 The University subsequently initiated an investigation which was conducted by Scott  
14 Spencer, Custodian Manager. During the investigation, Mr. Spencer interviewed and elicited most  
15 of his information from Appellant, Ms. Sium, Ms. Whitney, Mr. Purganan. However, he also met  
16 with Mr. Agard and several other custodians. As the investigation progressed, additional details of  
17 Appellant's behavior were revealed, including his hugging Ms. Sium and asking her to touch his  
18 penis. Mr. Spencer ultimately concluded that Appellant, more likely than not, engaged in the  
19 misconduct as alleged by Ms. Sium. On June 27, 2000, he issued his findings and recommendation  
20 that Appellant be terminated.

21  
22 2.19 Gene Woodard, Director for Facilities Services Custodial Division, reviewed the  
23 recommendation by Mr. Spencer and on June 27, 2000, he met with Appellant. Appellant  
24 continued to deny the allegations and offered some theories as to why Ms. Sium might have  
25 fabricated her story. Appellant speculated that Ms. Sium and Mr. Purganan conspired against him  
26 because he had seen them coming out of dark rooms together. However, Mr. Woodard was unable

1 to confirm or corroborate Appellant's allegations and he was not persuaded that they occurred  
2 because Appellant had not previously reported these incidents. Appellant also alleged that Mr.  
3 Spencer was biased against him and wanted to terminate him. Mr. Woodard ultimately concluded  
4 that Appellant was not credible and he forwarded the recommendation on to the appointing  
5 authority.

6  
7 2.20 The University has adopted and published a policy which prohibits sexual harassment. The  
8 policy defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and  
9 other verbal or physical conduct of a sexual nature when submission to such conduct is made either  
10 explicitly or implicitly a term or condition of an individual's employment, submission to or  
11 rejection of such conduct is used as a basis for employment or such conduct has the purpose or  
12 effect of unreasonably interfering with an individual's work or creating an intimidating or hostile or  
13 offensive environment. The policy directs employees to report sexual harassment complaints.  
14 Appellant, Ms. Sium, Ms. Whitney and Mr. Purganan were aware of this policy.

### 15 16 **III. ARGUMENTS OF THE PARTIES**

17 3.1 Respondent argues that Appellant engaged in a pattern of escalating inappropriate behavior  
18 toward Ms. Sium. Respondent argues that Appellant's behavior included hugs and touching.  
19 Respondent argues that Ms. Sium was a perfect victim because she was from another country, was  
20 completing her probationary period, and because Appellant, as a lead, was a person in authority.  
21 Respondent argues that Ms. Sium knew she was supposed to report Appellant's misconduct, but  
22 was afraid to do so because she believed she would be challenged, called a liar and terminated.  
23 Respondent argues that Ms. Sium's fear that reporting Appellant would hurt her chances of  
24 becoming a permanent employee was a powerful reason for not coming forward. Respondent  
25 argues that Ms. Sium, Ms. Whitney and Mr. Purganan are credible witnesses with no motive for  
26



1 fabricating allegations against Appellant. Respondent argues that Appellant abused his authority  
2 and that the termination should be upheld.

3  
4 3.2 Appellant denies that he sexually harassed or inappropriately touched Ms. Sium. Appellant  
5 asserts Ms. Sium's allegations are not credible because she never reported her allegations, no hard  
6 facts exist to support Ms. Sium's accusations, substantial time had elapsed before the accusations  
7 were communicated to Respondent and because new accusations were made several weeks after  
8 Ms. Sium's first statement was first obtained. Appellant further asserts that Ms. Sium's reason for  
9 not reporting accusations lacks credibility. Appellant asserts that Ms. Sium, Mr. Purganan and Ms.  
10 Whitney violated Respondent's policy against sexual harassment which required them to  
11 immediately report allegations of unwanted touching and/or sexual harassment. Appellant asserts  
12 that the charges against him may stem from a few incidences where he caught Ms. Sium and Mr.  
13 Purganan together during their work shift, which was against policy.

14  
15 Appellant argues that Respondent's investigation was flawed because it omitted important  
16 information from Appellant's supervisor that he never observed Appellant following Ms. Sium or  
17 checking on her every day and that he never observed Ms. Sium appearing distressed or upset.  
18 Appellant asserts that Mr. Spencer was angry that Appellant had accused him of being biased  
19 during the investigation; that Mr. Spencer's investigation failed to look into other potential causes  
20 for Ms. Sium's distress; that he failed to look into her background of making similar allegations  
21 with other employers; and that he failed to look into the relationship between Ms. Sium, Mr.  
22 Purganan, and Ms. Whitney. Appellant argues that in this case, Respondent was so focused on  
23 protecting its own liability that it erred on the side of Ms. Sium.  
24  
25  
26

#### IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; WAC 251-12-240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Abuse of fellow employees is established when it is shown that the employee wrongfully or unreasonably treats another by word or deed. Johnson v. Lower Columbia College, PAB No. D93-077 (1994).

4.4 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.5 Conduct is unwelcome if the employee does not solicit or incite it, and regards it as undesirable or offensive. Schonauer v. DCR Entertainment, 79 Wn. App. 808 (1995), *review denied*, 129 Wn. 2d 1014 (1996).

4.6 As in Maruca v. Dep't of Labor and Industries, PAB No. D94-009 (1995), *appeal filed* Thurston Co. Super. Ct. No. 95-2-03873-2, we are cognizant of the difficulties inherent in proving, or disproving, sexual harassment charges, particularly in circumstances such as the ones presented here, where no one else witnessed or heard the disputed incident. Both the alleged victim and the

1 alleged harasser bear the burden of proving, with little or no corroboration, that the incident did or  
2 did not occur.

3  
4 4.7 The University has procedures that encourage employees to come forward with sexual  
5 harassment complaints. However, Ms. Sium provided compelling testimony that she chose to  
6 tolerate the harassment rather than risk losing her job. In addition to her fear of reprisal, Ms. Sium  
7 felt ashamed and embarrassed. Ms. Sium's reluctance to come forward and her reluctance to  
8 immediately disclose all details of what she had been subjected to was reasonable under the  
9 circumstances. Additionally, Ms. Whitney and Mr. Purganan were privy to an extremely sensitive  
10 issue and their reluctance to come forward sooner is also understandable given Ms. Sium's  
11 insistence that they not reveal the allegations. Respondent has met its burden of proving that  
12 Appellant engaged in behavior of a sexual nature which was unwelcome and personally offensive to  
13 Ms. Sium and affected Ms. Sium's working conditions. Appellant's misconduct created an  
14 intimidating, hostile and offensive work environment for Ms. Sium. Respondent has proven by a  
15 preponderance of the credible evidence that Appellant neglected his duty to treat Ms. Sium with  
16 respect and dignity. Furthermore, Appellant's misconduct violated the University's policy against  
17 sexual harassment and interfered with the University's ability to ensure that its employees were  
18 protected from any form of sexual harassment in the workplace.

19  
20 4.8 Appellant has provided no compelling evidence to show that Mr. Spencer relied on  
21 inappropriate information in making his recommendation that Appellant be terminated and nothing  
22 in the record established that Mr. Spencer's recommendation resulted from any bias or animosity  
23 toward Appellant.

1 4.9 Under the facts and circumstances of this case, including the seriousness of the offenses, we  
2 conclude that Respondent has proven that the sanction of dismissal is appropriate and the appeal  
3 should be denied.

4  
5 **V. ORDER**

6 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Pedro Paltep is denied.

7 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

8  
9 WASHINGTON STATE PERSONNEL APPEALS BOARD

10  
11 \_\_\_\_\_  
Gerald L. Morgen, Vice Chair

12  
13 \_\_\_\_\_  
Leana D. Lamb, Member